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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JALAL ZORA et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN DIEGO
COUNTY,

Respondent.

M&H REALTY PARTNERS IV L.P.,

Real Party in Interest.

D045192

(Super. Ct. No. GIC831448)

Petition for writ of mandate or other appropriate relief from an order of the Superior Court of San Diego County, J. Richard Haden, Judge. Petition granted.

I

INTRODUCTION

Petitioners Jalal Zora and Sana Zora (the Zoras) seek a writ of mandate directing the superior court (a) to enter judgment in favor of the Zoras in San Diego County

Superior Court Case No. GIC773793, pursuant to this court's March 19, 2004, opinion in *M&H Realty Partners IV L.P. v. Zora, et al.*, case No. DO40402 (nonpub. opn.) (*hereafter, M&H Realty I*); (b) to award the Zoras restitution and attorney fees and costs at trial pursuant to this court's March 19, 2004 opinion; and (c) to vacate its order of September 2, 2004, or, in the alternative, not enforce that order. We conclude that the trial court erred in allowing M&H to amend the complaint in Superior Court case No. GIC773793 and in consolidating that case with Superior Court case No. GIC831448 after the appeal and the issuance of the remittitur from this court in *M&H Realty I*. Because the trial court failed to follow the directions of this court as set forth in the "Disposition" section of our *M&H Realty I* opinion, we grant the Zoras' petition for a writ of mandate.

II

FACTUAL AND PROCEDURAL BACKGROUND

This petition follows our recent opinion in case *M&H Realty I*. A more detailed description of the factual and procedural background of the case is set forth in that opinion. We provide here an abbreviated version of the background facts of the case, and those facts most pertinent to the writ petition before us.

A. Factual background

Beginning in 1986, the Zoras owned and operated a store called Corner Liquor located in the Mira Mesa Mall. In May 1998, the Zoras entered into a written lease with their landlord, the California Public Employees' Retirement System (CalPERS).

Paragraph 3 of the lease required the Zoras to pay both minimum rent and percentage rent based on Corner Liquor's gross sales. The lease included several default provisions.

Paragraph 20(b) of the lease defined an "Event of Default" to include either of the following: (1) "Tenant fails to pay any installment of Minimum Rent, Percentage Rent, or Additional Rent or other charges hereunder for a period of three (3) days after receipt of notice by Landlord"; or (2) "Tenant fails to perform any other covenant, term, agreement or condition of this Lease within thirty (30) days following receipt of notice by Landlord"

In June 2000, M&H Realty Partners IV L.P. (M&H) purchased the mall from CalPERS and acquired CalPERS's interest in the leases. M&H planned to move out all of the tenants and redevelop the mall. By the time of the trial in this case, the Zoras were the only remaining tenants who had not either moved or agreed to move out of the mall.

In mid-2001, a certified public accountant hired by M&H conducted an audit of Corner Liquor and concluded that the Zoras had underreported gross sales for the lease years May 1, 1998 to April 30, 1999, May 1, 1999 to April 30, 2000, and May 1, 2000 to April 30, 2001. The accountant calculated that the Zoras owed \$20,062 in unpaid percentage rent for the three years covered by the audit.

M&H served the Zoras with a notice of rent due on or about July 23, 2001. The notice stated that the Zoras were required to pay the sum of \$20,062 in full within three days of receiving the notice. The Zoras did not respond to the notice within three days. M&H then sent the Zoras a 30-day notice of termination on July 30, 2001. In the 30-day notice, M&H declared a noncurable breach and stated its intent to terminate the lease based on the Zoras' allegedly willful or grossly negligent underreporting of gross receipts.

Because the Zoras' bookkeeper had concluded that the Zoras owed only \$8,289.29 in unpaid percentage rent for the three-year period at issue, the Zoras sent a check for this amount to M&H, along with a check for the minimum rent for August 1, 2001. M&H returned both checks to the Zoras, who then deposited the two checks and all subsequent rent checks into a trust account.

B. Procedural history in the trial court

M&H filed a complaint against the Zoras on September 4, 2001. In its complaint, M&H alleged two causes of action for unlawful detainer. Before trial, the court granted M&H leave to amend the complaint to add a third cause of action for unlawful detainer.

After a bench trial, the court issued a written statement of decision in favor of M&H on the first and third causes of action and in favor of the Zoras on the second cause of action. The court concluded that the term "gross sales" in Exhibit D of the lease had the same meaning as "gross receipts" as defined in Paragraph 1(h), and that both terms included service income. The court found that the accountant's audit report accurately reflected the dollar amount by which the Zoras had underreported their gross receipts and underpaid their percentage rent for the three-year audit period. The court further concluded that the Zoras had breached their obligations to pay percentage rent on a monthly basis, to provide M&H with their quarterly sales tax forms, to provide M&H with yearly statements of gross receipts, and to accurately report percentage rent. However, the court concluded that the Zoras' failure to pay percentage rent was neither willful nor grossly negligent.

The court entered judgment for M&H, awarding possession of the premises, past due percentage rent for the three-year audit period of \$20,062.25, prejudgment interest of \$2,357.82, late charges of \$1,007.66, and additional litigation costs and attorney fees.

C. Appellate history

The Zoras appealed the trial court's judgment. In their appeal, the Zoras contended that the three-day notice of rent due was defective because it was not phrased in the alternative as a notice to pay rent or quit the property and because it improperly demanded payment of rent due for more than the one-year period immediately preceding service of the notice. The Zoras also challenged whether M&H could invoke the multiple breach provision of the lease because M&H had not given the Zoras notice or an opportunity to cure the predicate defaults before terminating the lease.

This court issued an opinion on March 19, 2004, in which we concluded that M&H could not prevail on any of its three unlawful detainer causes of action, as a matter of law. We agreed with the Zoras that M&H's three-day notice of rent due was invalid because the notice demanded more than three years of past due rent, in violation of Code of Civil Procedure section 1161, subdivision 2. We also concluded that M&H could not invoke the multiple breach provision of the lease because it had not given the Zoras notice or an opportunity to cure the predicate defaults prior to terminating the lease. In the disposition section of our opinion, we reversed the trial court's judgment and remanded the matter, directing that the trial court:

"[E]nter judgment in favor of the Zoras, including any award of restitution necessary to restore the Zoras 'so far as possible to the positions they occupied before the enforcement of or execution on

the judgment' [citation] and any award of costs and attorney fees pursuant to paragraph 36 of the lease agreement or any other applicable provision of law."

On April 14, 2004, this court denied M&H's petition for rehearing. Thereafter a remittitur issued, and the matter was sent back to the trial court.

D. Proceedings after remand

On June 15, 2004, M&H filed a new action against the Zoras, *M&H Realty Partners IV L.P. v. Zora, et al.*, San Diego County Superior Court case No. GIC831448 ("new action"). In the complaint in the new action, M&H alleged four causes of action seeking a declaratory judgment that at the time M&H filed its unlawful detainer action, M&H *could have* terminated the Zoras' lease based on ejectment and quiet title. The complaint included a fifth cause of action for fraud, based on allegations that the Zoras had made misrepresentations in various tenant estoppel certificates.

On June 25, the Zoras lodged a proposed judgment in this case with the court. The proposed judgment provided that the Zoras were the prevailing parties in Superior Court Case No. GIC773793, and that they were entitled to restitution, costs at trial, costs on appeal, and attorney fees for both the trial and the appeal. On June 28, 2004, the Zoras filed their motion for award of attorney fees.

M&H filed objections to the proposed judgment on July 8, claiming that the Zoras were not entitled to judgment in Superior Court Case No. GIC773793 because M&H's first amended complaint in that case stated causes of action for quiet title and ejectment

that had not yet been adjudicated.¹ On July 23, M&H filed a "Motion . . . for Leave To File Second Amended Complaint Or In The Alternative To Consolidate Action With Related Case" in Superior Court Case No. GIC773793. The proposed second amended complaint contained the same claims as the complaint filed in the new action. M&H also filed an opposition to the Zoras' motion for attorneys fees. M&H reiterated the arguments it made in its motion for leave to amend its complaint, maintaining that it "has the right to retry its case under theories of ejectment and quiet title," that the judgment did not bar the filing of an amended complaint, and that any award of attorney fees would be "premature" until all of M&H's claims were decided.

On August 13, the trial court issued the following minute order:

" . . . [T]he proposed judgment is in proper form given the opinion of the Court of Appeal is now final and res judicata on the issues for which M&H seeks a retrial. M&H's claim it was entitled to possession of the premises at issue because of Zora's [*sic*] alleged breaches of the lease is now extinguished. Further, M&H is collaterally estopped to now raise the theories of ejectment and/or quiet title. [¶] The Court of Appeal reversed with directions to enter judgment in favor of the Zoras, including costs and attorney's fees in the trial court. The only remaining issues are the amount of restitution, if any, the Zoras are entitled to for having been wrongfully evicted, as well as attorney's fees, costs, and costs on appeal. These issues are to be resolved on motion to be filed by the Zoras."

¹ In fact, the only causes of action asserted in the first amended complaint were three claims for unlawful detainer. M&H's position as to whether it did or did not assert causes of action for ejectment and/or quiet title in its first amended complaint remains inconsistent even in its briefing in response to the Zoras' writ petition. At one point, M&H asserts that "reversal of the UD judgment decided only part of M&H's entire case against Petitioners, and did not adjudicate its non-UD causes of action," while later in its briefing M&H admits that it "seeks to assert *for the first time* causes of action and issues not previously decided." (Italics added.)

On August 23, the trial court signed and entered the Zoras' proposed judgment.

On August 27, the trial court heard oral argument on the Zoras' motion for attorney fees and M&H's motion for leave to file a second amended complaint. On September 2, the trial court issued a joint order on the motions, granting M&H's motion to amend its complaint in the original case and ordering that action be consolidated with the new action. The court also determined that the Zoras were entitled to an award of their attorney fees and costs on the appeal, but that the Zoras were not entitled to restitution under Code of Civil Procedure section 908 or to an award of attorney fees and costs at trial because M&H's "causes of action for ejectment and quiet title remain" and "their determination may effect [*sic*] which party is the prevailing party."

III

DISCUSSION

The Zoras contend that the trial court erred in allowing M&H to file an amended complaint in the original action stating new causes of action after this court remanded the case to the trial court with directions to enter judgment in favor of the Zoras and to award the Zoras restitution and attorney fees. We agree.

A. The Zoras' petition for a writ of mandate is proper in this circumstance

A "failure to follow appellate directions can be challenged by an immediate petition for writ of prohibition or writ of mandate." (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982 [when trial court fails to carry out specific instructions of reviewing court, proper remedy is to petition for writ of mandate or prohibition in court of appeal].)

A petition for a writ is particularly appropriate where, as here, the remedy afforded by an appeal from a final judgment will be neither speedy nor adequate because the petitioner "would still be subjected to the vicissitudes and expense of an unnecessary trial.

[Citations.]" (*Hampton v. Superior Court* (1952) 38 Cal. 2d 652, 657 (*Hampton*).

Therefore, a writ of mandate is a proper remedy to require the superior court to enter judgment in conformity to a remittitur. (*Lamb v. Owen* (1929) 98 Cal. App. 106, 108.)

B. The Zoras' writ petition must be granted

1. A writ should issue because the trial court was without power to do anything other than follow the directions of this court on remand

A reviewing court has the authority to "affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." (Code Civ. Proc., § 43.) "The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned." (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701.)

"The order of [an] appellate court as stated in the remittitur, 'is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.'

[Citation.]" (*Hampton, supra*, 38 Cal. 2d at p. 656.) "When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the

directions is unauthorized and void." (*Butler v. Superior Court, supra*, 104 Cal. App. 4th at p. 982; see also *Hampton, supra*, 38 Cal.2d at pp. 655-656; *Coffee-Rich, Inc. v. Fielder* (1975) 48 Cal. App. 3d 990, 998.)

In reversing the trial court's judgment and remanding this case to the trial court, we directed that the trial court "enter judgment in favor of the Zoras, including any award of restitution necessary to restore the Zoras 'so far as possible to the positions they occupied before the enforcement of or execution on the judgment' [citation] and any award of costs and attorney fees pursuant to paragraph 36 of the lease agreement or any other applicable provision of law." As is readily apparent from the wording of the disposition, this court's directions in our March 19, 2004, opinion did not direct or authorize the trial court to reopen this case for further proceedings, nor did it allow the filing of supplemental or amended pleadings. The only issues left for further consideration by the trial court were the amount of restitution to be awarded to the Zoras in order to restore them "so far as possible to the positions they occupied before the enforcement of . . . the judgment," and the amount of costs and attorney fees to which the Zoras are entitled for litigation both in the trial court and on appeal.

Despite the clear directions presented in our disposition, on remand the trial court failed to follow the instructions of this court and exceeded the scope of the jurisdiction granted it by this court's remand directions. After entering judgment on the unlawful detainer causes of action in favor of the Zoras, the court allowed M&H to file an amended complaint *in the original action* alleging new claims based on theories of ejectment, quiet title and fraud. Then, on the basis that the resolution of M&H's new

claims against the Zoras might reduce the amount of restitution and/or costs and attorney fees due to the Zoras, the trial court refused to award the Zoras either restitution or their costs and attorney fees incurred in the trial court in litigating the unlawful detainer claims.²

2. *A writ should issue because the trial court erred in allowing M&H to amend its complaint and in consolidating the underlying case with the new action after this court's remand*

Even if the trial court's actions were not in direct contravention of the disposition set forth in this court's March 19, 2004, decision in the underlying case, the trial court erred in granting M&H's request to amend its unlawful detainer complaint to allege new theories for determining the rights of the parties. The court also erred in consolidating the underlying action with the new action filed by M&H.

M&H argues that it has "the right to retry the case under legal theories (e.g. quiet title and ejectment) not decided on the appeal." In support of this argument, M&H cites *Atchison etc. Ry. Co. v. Superior Court* (1939) 12 Cal.2d 549 (*Atchison*).

In *Atchison*, a railway brakeman sued for personal injuries allegedly caused by a defective ladder on a freight-car. In the original complaint, the plaintiff sought damages

² We recognize that the trial court was attempting to avoid a situation in which M&H would pay restitution, costs and attorney fees to the Zoras based on the resolution of the unlawful detainer causes of action, when the Zoras might end up having to pay M&H a monetary award on the new claims. However, our decision in the underlying case was clear and left no room for alteration. In the original case, M&H brought claims against the Zoras for unlawful detainer only; our decision entirely disposed of those claims. The Zoras are entitled to have the unlawful detainer action conclude without further litigation. This is clearly the result contemplated by this court's decision in *M&H Realty I*.

under two legal theories: negligence and strict liability under the Federal Safety Appliance Act. At trial, the defendant railroad offered evidence going to the plaintiff's assumption of risk, an affirmative defense to the negligence claim. Plaintiff's counsel then decided to abandon the claim for negligence and proceeded to try to case on the basis of the statutory claim only. (*Atchison, supra*, 12 Cal.2d at p. 552). The trial court excluded evidence of assumption of risk, and the plaintiff won a judgment. (*Ibid.*) On appeal, the United States Supreme Court reversed the judgment, concluding that the plaintiff could not bring a claim under the Federal Safety Appliance Act and that the plaintiff had abandoned his negligence claim, which was the only possible legal ground on which he could recover. (*Id.* at 553.)

On remand from the United States Supreme Court, the California Supreme Court ordered the trial court to enter judgment in favor of the defendant and to award the defendant its costs on appeal, but not its trial court costs. (*Atchison, supra*, 12 Cal.2d at p. 554). On the plaintiff's petition to modify the judgment to expressly permit a retrial, the California Supreme Court determined that the question whether or not to have a retrial should be decided by the trial court. (*Ibid.*) The plaintiff then filed a motion in the trial court to set the case for retrial on his previously abandoned negligence theory. The defendant railroad sought a writ of prohibition from the California Supreme Court to prevent the retrial. The Supreme Court denied the writ, concluding that the plaintiff had the right to retry his case on the previously abandoned negligence theory. (*Id.* at 550-551, 554.)

Atchison is inapplicable to the situation before us for a number of reasons. First, *Atchison* does not stand for the proposition advanced by M&H that "a writ of prohibition will not issue, after reversal of a judgment for plaintiff and remand *with directions to enter judgment for the defendant*, to prevent retrial *on legal theories not decided in the appeal*." (Italics original.) Rather, in *Atchison*, the California Supreme Court held that a directed judgment that *does not provide for trial court costs* "cannot be construed as denying the right to a retrial." (*Atchison, supra*, 12 Cal.2d at p. 554.) Further limiting the reach of its decision, the Court stated, "Said judgment, in the circumstances [i.e., that the defendant had specifically requested and been denied a modified judgment awarding trial costs], neither affirms nor denies the right to retry the action." (*Ibid.*) Here, in contrast, we not only directed that the trial court enter judgment in favor of the Zoras in the original case, but we also specifically directed the trial court to award the Zoras their *trial costs*. Since the directed judgment here *did* direct an award of trial court costs, it could be construed only as denying any right to a retrial. Because the directed judgment in *Atchison* failed to provide for trial court costs while the directed judgment here specifically directed the trial court to award trial costs, the situation presented by this case is fundamentally unlike the situation presented in *Atchison*.

Second, in *Atchison*, the plaintiff *originally* alleged two theories of liability, one under the Federal Safety Appliance Act (45 U.S.C., §§ 11-16) and one for common-law negligence. (*Atchison, supra*, 12 Cal.2d at p. 551.) At trial, the plaintiff decided to abandon the common-law negligence theory and to proceed with testimony only as to the Safety Appliance Act claim. After the United State Supreme Court determined that the

plaintiff could not prevail on his Safety Appliance Act claim as a matter of law, the California Supreme Court concluded that the plaintiff was not precluded from retrying the case under his previously abandoned alternative theory. (*Id.* at pp. 555-556.)

According to the California Supreme Court:

"The doctrine of election of remedies does not defeat plaintiff's claim to a retrial. The doctrine of choice between inconsistent remedies presupposes a choice of remedies. Where a party misconceives his remedy, he is not in general precluded thereby from availing himself of the proper remedy. [Citations.] That the proper basis of plaintiff's claim presents a difficult problem is indicated by the fact that the trial court and this court affirmed his right to proceed under the Safety Appliance Act, while the Supreme Court of the United States ruled otherwise. A mere mistake of judgment should not result in depriving one of valuable rights. [Citation.]" (*Id.* at p. 555.)

Thus, *Atchison* suggests that under unique circumstances such as existed in that case, a party may have the right to retry a case after reversal by a reviewing court by pursuing *legal theories that were presented in the trial court before the appeal was taken* but were, for some reason, abandoned or ignored such that they were not decided on appeal. Unlike in *Atchison*, here M&H phrases its request as an opportunity to "retry" its civil action on legal theories it *never asserted* prior to the appeal in which we directed judgment in favor of the Zoras. Although M&H frames its request as a request to "retry" its claims, what M&H is actually asking for is the opportunity to assert, for the first time, completely new theories of recovery in a new civil action, based on the same essential facts underlying the original case. (Compare with *Atchison, supra*, 12 Cal.2d at p. 557 ["[Plaintiff] is relying on the same facts as on the first trial, and, indeed, on the same law, the Federal Employers' Liability Law, which imposes liability on the employer for injury

both for violations of the Safety Appliance Act and common-law negligence. He desires to retry the same cause of action . . . "].)

M&H contends that it should have the opportunity to "retry" these new theories because these theories were "not decided" on appeal. However, the reason these theories were "not decided" on appeal is because the theories were never raised at any time prior to the appeal. Since M&H failed to present these theories in the trial court, they could not have been at issue on appeal, and certainly could not have been decided on appeal. However, the fact that they were "not decided" on appeal does not mean that M&H can raise them now.

M&H's suggestion that the legal theories it wishes to assert in an amended complaint can be "retried" because they were "not decided" on appeal implies that M&H raised these theories prior to the appeal and that they were ignored by the trial court and/or the appellate court. Such a suggestion is disingenuous. M&H has not in fact previously raised claims of ejectment or quiet title. Further, if we were to adopt M&H's suggested approach, then virtually no case would ever be final after a judgment directed by a reviewing court because a plaintiff who lost on all of its claims at the appellate level could amend its complaint after the remittitur had issued to allege new and different theories of liability that the plaintiff failed to raise initially. Allowing a plaintiff to pursue claims in such a piecemeal fashion would effectively eliminate the requirement that plaintiffs pursue all related claims at the same time in a single action, and would be patently unfair to defendants who could never be assured of finality in litigation. Further, permitting such amendments after appeal, which would presumably relate back to the

date on which the original complaint was filed, would undermine the purposes of statutes of limitation.

M&H's complaints ring hollow since M&H presumably made a choice to pursue only its unlawful detainer claims at the outset of this litigation. The purpose of unlawful detainer proceedings is timely restoration of possession. "Time periods for pleading [in unlawful detainer actions] are shorter than ordinary civil actions, the matter is set for trial more quickly and entitled to priority on the trial calendar, and expeditious enforcement procedures are available. [Citation.] In contrast to the relatively quick and inexpensive proceedings for evicting tenants, California law does not provide any summary remedy for ejectment." (*Titus v. Canyon Lake Property Owners Assn.* (2004) 118 Cal. App. 4th 906, 914.) For this reason, issues extrinsic to the possessory right are generally excluded from unlawful detainer actions, even though they otherwise arise out of the subject matter of the action. (*Green v. Superior Court* (1974) 10 Cal.3d 616, 632-634.) This is because "[i]t would obviously be unfair to require the defendant-tenant to defend against ordinary civil actions under the constraints of the summary procedure in unlawful detainer actions. Indeed, the constitutionality of these summary procedures is based on their limitation to the single issue of right to possession and incidental damages." (*Lynch & Freytag v. Cooper* (1990) 218 Cal. App. 3d 603, 609.)

If M&H had wanted to bring causes of action against the Zoras for ejectment and/or quiet title together with the unlawful detainer causes of action, they would not have been able to avail themselves of the procedural advantages of an unlawful detainer action. If M&H had joined all of these claims together in a single action, the case would

have had to proceed as an ordinary civil case, and would not have been granted the priority an unlawful detainer action normally receives. Thus, in order to retain the benefit of the summary procedures available in an unlawful detainer action, M&H would have had to file two separate actions. The unlawful detainer action would have received priority treatment; the other action, for claims of ejectment and quiet title, would have proceeded in the ordinary course for civil actions. M&H presumably elected not to include its ejectment and quiet title claims in its unlawful detainer case because it wanted to take advantage of the summary procedures available for unlawful detainer claims. Yet M&H now wants to be allowed to amend its unlawful detainer complaint, after appeal and judgment, to do what it could not have done in the first place—assert claims for ejectment and quiet title in the unlawful detainer action. To allow M&H to do so would be patently unfair.

M&H had a choice early in the litigation as to whether to file only an unlawful detainer action, to file separate actions—one for unlawful detainer and the other for ejectment and quiet title, or to combine in a single action its unlawful detainer claims and the ejectment, quiet title, and fraud claims it now seeks to raise. M&H chose to pursue only an unlawful detainer action; it did not file its separate action for ejectment and quiet title until *after* it had lost the unlawful detainer action on appeal.³ M&H now must live with the consequences of that choice.

³ We note that M&H's claims for ejectment and quiet title in the new action may be moot considering the fact that the Zoras were no longer in possession of the store in question at the time the new action was filed and the fact that M&H has since sold the

The trial court's order allowing M&H to amend its original complaint and consolidating the underlying case with the new action constituted error because the court's action exceeded the scope of what the trial court had the authority to do on remand, and also because consolidating the cases was an abuse of discretion since there was no legal basis for consolidating the new case with a case that was essentially completed. The order of this court directing judgment in favor of the Zoras and directing the trial court to award the Zoras restitution and the costs of the litigation, including attorney fees, effectively ended the original case; there was nothing left to do except to determine the amount of restitution, costs and attorney fees due the Zoras. Our order clearly did not allow for amendment of the complaint. Also, because the original case was effectively over, there was no action with which to consolidate the "new action."

IV

CONCLUSION

Upon receiving the remittitur from this court with our order directing entry of judgment in favor of the Zoras and awarding restitution and costs, the trial court had the authority to act only in accordance with the directions of this court. The trial court's September 2, 2004, order is void because the trial court did not have the authority to

property and no longer has a possessory interest in it. Although M&H appears to seek a declaration as to its former rights vis-à-vis the Zoras, we question whether such a retrospective declaration would be proper. We further note that the Zoras raise a question as to whether the claims M&H raises in the new action are barred by the statute of limitations. This may explain why M&H would like to amend its complaint in the original action, or consolidate any new action with the original action. However, these issues are not before us, and we therefore express no opinion as to whether the claims in

refuse to award the Zoras restitution or costs and attorney fees, nor did it have authority to allow M&H to file an amended complaint in the original action alleging new causes of action or to consolidate the original action with the new action. The Zoras' petition for a writ of mandate is granted.

V

DISPOSITION

Let a writ of mandate issue directing the superior court to:

- (a) Vacate its order of September 2, 2004;
- (b) Enter judgment in favor of the Zoras in Case No. GIC773793;
- (c) Hold an evidentiary hearing limited to determining the amount of restitution, costs, and attorney fees to which the Zoras are entitled, pursuant to the disposition set forth in this court's opinion in *M&H Realty Partners IV L.P. v. Zora et al.*, case No. D040402, filed March 19, 2004 (nonpub. opn.);
- (d) Award the Zoras restitution, costs, and attorney fees in an amount determined to be proper pursuant to the findings of the court after the evidentiary hearing; and

the new action are either moot or barred by the statute of limitations. These issues will presumably be dealt with by the trial court in the new action.

(e) Award the Zoras costs and attorney fees for responding to M&H's challenges to the proposed judgment and M&H's motion for leave to amend its complaint.

The Zoras are entitled to costs related to bringing this petition for a writ of mandate.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.